No. 03-569

IN THE
Supreme Court of the United States

ALLIANT ENERGY CORPORATION,

Petitioner,

v.

BURNEATTA BRIDGE, AVE M. BIE AND ROBERT M. GARVIN, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE WISCONSIN PUBLIC SERVICE COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE* EDISON ELECTRIC INSTITUTE, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN GAS ASSOCIATION, AND NATIONAL ASSOCIATION OF WATER COMPANIES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a state law that regulates the transactions of a public utility holding company outside of state borders is unconstitutional under the Commerce Clause?

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INTEREST OF THE *AMICI CURIAE*[1]

The decision of the Seventh Circuit in this case—rejecting a Commerce Clause challenge to a state law that regulates out-of-state transactions of public utility holding companies—has enormous implications beyond the immediate parties. The wide range of *amici curiae* joining in this brief illustrates this point. *Amici* are the leading trade associations in the United States for the electricity, natural gas, investor-owned water service, and manufacturing industries. Together, they represent more than 20,000 companies whose interests will be directly affected by the outcome of this case.

Edison Electric Institute ("EEI") is the national association of over 200 U.S. shareholder-owned electric companies, their affiliates and industry associates worldwide. Its members generate approximately three quarters of all electricity generated by electric companies and serve about seventy percent of all retail customers in the nation. EEI members include 54 holding companies serving customers in at least 46 states. EEI's members believe that their access to capital may be impaired by the Seventh Circuit's decision.

The American Gas Association ("AGA") represents 191 local energy utility companies that deliver natural gas to more than 53 million homes, businesses and industries throughout the United States. AGA member companies

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[1] Counsel of record for both petitioner and respondents have consented to the filing of this brief in letters that have been lodged with the clerk. No counsel representing a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their members made a monetary contribution to the preparation or submission of this brief. Petitioner is a member of one or more of the *amici* trade associations, but has not made a monetary contribution to the preparation or submission of this brief except as insofar as it, like other members, provides overall support for activities of the association.

account for roughly 83% of all natural gas delivered by local natural gas distribution companies. AGA is an advocate for local natural gas utility companies and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international gas companies and industry associates.

The National Association of Water Companies ("NAWC") is the national trade association representing the investor-owned segment of the water supply industry. NAWC member companies operate in 39 States and provide water service to over 22 million people. As this industry has consolidated, many of its members have become multi-state holding companies. Further, due to aging infrastructures, increasingly stringent water quality standards, security concerns and consolidation pressures, water utilities are investing in new and replacement plant at an unprecedented pace. Given the magnitude of this undertaking, the membership of NAWC is also concerned that the decision of the Seventh Circuit will impair access to needed capital.

The National Association of Manufacturers (the "NAM") is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. More than 158,000 additional businesses are affiliated with NAM through its Council of Manufacturing Associations and National Industrial Council.

The companies represented by the *amici* have an interest in the prompt resolution of the legal issue presented here. Today, the growth of many public utility holding companies is dependent upon the availability of capital for investment in infrastructure. The Wisconsin utility law, however, inhibits investment by out-of-state companies. For example, once an investor acquires control of as little as 5% of a Wisconsin-based utility, that investor becomes subject to Wisconsin

rules restricting investment and diversification options. Faced with these onerous barriers, out-of-state investors are unlikely to invest in companies holding utility assets. Indeed, respondents readily admitted below that the state provisions at issue "have the effect of discouraging entities that are not based in Wisconsin from seeking to acquire a controlling interest in Alliant Energy." Appellee Br. at 32.

Amici are united in the belief that the uncertainty created by the Seventh Circuit's decision along with similar decisions would have a severe adverse impact on their respective industries. The Seventh Circuit's decision not only emboldens other states to enact similar laws, but the mere perception that the states have such power will inhibit investment in utility holding companies across the nation. These concerns, which underlie the petition for a writ of certiorari, are important to a wide spectrum of industries. *Amici*, therefore, submit this brief in support of petitioner.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Demonstrates The Need For Clarification On Whether States May Regulate Out-of-State Transactions

A. The Wisconsin Law Regulates Out-of-State Transactions

The Wisconsin Utility Holding Company Act (WUHCA) establishes a regime for controlling financial decisions of public utility holding companies. A holding company is defined broadly to include any person owning or controlling 5% or more of a Wisconsin-based utility. Wis. Stat. § 196.795(1)(h)1.a. Thus, if an out-of-state investor acquired as little as 5% of the shares of a Wisconsin utility, the acquirer would itself become subject to state regulation.

The WUHCA then places significant restrictions on that regulated company. One of the provisions precludes any

holding company from selling as little as 10% of its stock to a potential investor without advance state approval, after notice and a hearing. Wis. Stat. § 196.795(3) (Takeover Statute). This provision applies regardless of whether the stock will be sold in Wisconsin or whether the seller and buyer are Wisconsin residents.

A second provision limits diversification of the holding company. Known as the "asset cap," it blocks a holding company from owning 25% or more of non-utility assets. Wis. Stat. § 196.795(6m)(b). Thus, this provision limits non-utility investments in other states. Under a third provision, even those holding companies that remain within the asset cap, but that engage in any activities outside of four narrowly defined energy functions, cannot issue securities to fund those activities without prior administrative approval. Wis. Stat. §§ 201.03, 201.05 (PSC Securities Regulation Statutes). This provision also covers activities outside of Wisconsin.

B. The Decision Below Conflicts With This Court's Precedents

The Seventh Circuit upheld the Wisconsin statute, but on theories that reveal a deep confusion about this Court's Commerce Clause jurisprudence. The court of appeals agreed that the WUHCA regulated transactions occurring wholly outside of Wisconsin borders. The court observed that "some transactions regulated by these provisions may occur entirely outside of Wisconsin." (App. 30a). "For example," the court continued, "an Illinois corporation that owns a Wisconsin utility would be subject to Wisconsin regulation if it wished to sell 10% of its stock to an Indiana corporation[.]" (App. 30a). The court had "no doubt" that such transactions are "interstate in nature." (App. 30a-31a).

The Seventh Circuit ruled, however, that such extraterritorial applications are not *per se* invalid under this Court's Commerce Clause jurisprudence. The court

recognized that *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), contains language favorable to Alliant: "'The Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'" (App. 31a) (quoting *Edgar*, 457 U.S. 642-43). "This language, if controlling," said the Seventh Circuit, "would mean victory for Alliant." (App. 31a). However, the court said that this portion of *Edgar* had garnered only a plurality of the membership of this Court, and thus could be ignored. (App. 31a-32a).

In this, the Seventh Circuit was profoundly wrong. The quoted language *is* controlling because it has since been adopted by a majority of this Court. In *Healy v. Beer Institute*, 491 U.S. 324 (1989), the Court distilled the principles underlying its Commerce Clause jurisprudence. "Taken together," the Court observed, "our cases concerning the extraterritorial effects of state economic regulation stand at a minimum for the following propositions ...." *Id.* at 336. The first such proposition consisted of precisely the language from *Edgar* that the Seventh Circuit chose to ignore. The Court reiterated:

> the 'Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'

Id. (quoting *Edgar*, 457 U.S. at 642-43). Thus, *Healy* reaffirmed that an extraterritorial state law is *per se* invalid even if it has some positive domestic effects. The *Healy* Court applied that principle in striking down the Connecticut liquor price posting statute, which clearly served the interests of Connecticut consumers. That did not save the statute, the Court explained, because the Commerce Clause protects against "the projection of one state regulatory regime into the

jurisdiction of another State." *Healy*, 491 U.S. at 336-37. Thus, the very language that the Seventh Circuit thought would be decisive had in fact been established as controlling in *Healy*.[2]

On rehearing, the Seventh Circuit dodged the direct conflict with *Healy* by inventing a new basis for its decision. The court said that *Healy* dealt with "direct extraterritorial interference" (App. 7a), while the Wisconsin laws at issue here have only "indirect ... effects on extraterritorial transactions." (J.A. 4a). This distinction reflects a conclusion rather than an analysis. In any event, it incorrectly characterizes the Wisconsin provisions as having only indirect application. This Court has specifically ruled that "[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another *directly* regulates interstate commerce" in violation of the dormant Commerce Clause. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 582 (1986) (emphasis added). This is, of course, precisely what Wisconsin does here. (App. 30a).

In fact, the regulation of interstate commerce here is much more direct than in *Healy* and *Brown Forman*. In those cases the Court found that the "practical effect" of arguably in-state regulation was to regulate out-of-state transactions. In *Healy*, for example, the Connecticut statute required beer distributors to file monthly statements affirming that their prices in Connecticut did not exceed their prices in any neighboring state. 491 U.S. at 328 & n.5. The statute did

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[2] This portion of the *Edgar* opinion has also been cited with approval in several other decisions. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579, 582 (1986).

not, by its terms, require or prohibit any conduct outside Connecticut. The Court nonetheless recognized that the "practical effect" of the statute was to constrain the distributors' ability to adjust their prices in other states in response to local market conditions. *See id.* at 337-39. Here, by contrast, the Wisconsin law applies by its terms directly to out-of-state activity. The Seventh Circuit admitted as much when it said that "some transactions regulated by these provisions may occur entirely outside of Wisconsin" (App. 30a-31a).

The Seventh Circuit also attempted to defend its direct-indirect distinction by arguing that Alliant's challenge was based on the out-of-state "effects." On the contrary, Alliant challenges the Wisconsin law because it regulates out-of-state *conduct*. The Wisconsin law could apply where the seller, the buyer, both parties' brokers, the securities exchange, and the sale transaction are all in Illinois. This would project Wisconsin law into what is clearly an Illinois transaction, directly regulating interstate commerce.

The sweep of state power validated by the Seventh Circuit is all the more striking in light of what it invalidated. As originally enacted, the WUHCA required that all utility holding companies within its terms be incorporated in Wisconsin, Wis. Stat. § 196.53. The statute then sought to regulate those entities as Wisconsin corporations. The Seventh Circuit struck down the in-state incorporation requirement, but left the other provisions of the WUHCA intact. Thus, the broad provisions of the Wisconsin law became applicable to out-of-state corporations—a scope not even contemplated by the state legislature. Ironically, the State had argued before the Seventh Circuit that the in-state incorporation requirement had a rational purpose insofar as it legitimized the dubious out-of-state sweep of the other

provisions of the Wisconsin statute.[3] The Seventh Circuit, however, blithely sustained the extraterritorial reach of the Wisconsin statute without even the fig leaf of Wisconsin incorporation to cover it.

The startling breadth of the Seventh Circuit's decision goes far beyond *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), where this Court upheld an Indiana anti-takeover statute. There, this Court reasoned: "[w]e agree that Indiana has no interest in protecting nonresident shareholders *of nonresident corporations*. But this Act applies only to corporations incorporated in Indiana." *Id.* at 93. As envisioned by the Seventh Circuit, the Wisconsin statute applies to entities incorporated elsewhere. In effect, the Seventh Circuit has developed a special anti-takeover rule for utilities when this Court had struck down anti-takeover rules for other companies. *See Edgar*, 457 U.S. at 646.

The ruling of the Seventh Circuit is all the more incongruous in light of this Court's decisions over the past decade, which have increasingly signaled limits to extraterritorial state regulation. In a variety of constitutional contexts, this Court has recognized that an extraterritorial assertion of power by one state is actually an infringement on the sovereignty of another.

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[3] *See* App. 24a ("The only rationale the defendants provide to save the in-state incorporation provision is the argument that in-state corporation is necessary to save the constitutionality of the structural provisions."); *see also* Appellee Br. 28 ("[T]he challenged provisions only apply to Wisconsin utilities and utility holding companies, which by definition are Wisconsin corporations. The state is not attempting to govern out-of-state activities of foreign corporations in which the state has no legitimate interest, the sort of overreaching that led to Commerce Clause condemnation in *Edgar v. Mite Corp.*, 457 U.S. 624 (1982).").

In *BMW of North America v. Gore*, 517 U.S. 559 (1996), for example, the Court relied on *Healy* in recognizing limits to punitive damages under the Due Process Clause. The Court explained that no State can "impose its own policy choice on neighboring States." *Id.* at 571. Indeed, "one State's power to impose burdens on the interstate market ... is not only subordinate to the federal power over interstate commerce, ... but is also constrained by the need to respect the interests of other States." *Id.*

Similarly in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003), this Court explained that it is a "basic principle of federalism" that each State may make its own judgment about what conduct is proscribed and "what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." *Id.* at 1523. In finding that Utah could not, consistent with Due Process, impose punitive damages based on conduct in other states, the Court pointed to a long line of precedents limiting a state's power beyond its borders.[4] Here, Wisconsin creates civil liability for transactions in other states even when no liability would exist under the law of the state where the transaction actually occurres. *See* Wis. Stat. § 201.09(1).

In short, the Seventh Circuit opinion is profoundly out of step with this Court's precedents. By taking a narrow view of this Court's 1982 decision in *Edgar*, the court of appeals missed the entire thrust of this Court's subsequent jurisprudence in the Commerce Clause and other areas. A definitive articulation of the limits on extraterritorial legislation is therefore necessary here.

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[4] *See State Farm*, 123 S. Ct. at 1522 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-23 (1985); *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975); *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914); and *Huntington v. Attrill*, 146 U.S. 657, 669 (1892)).

C. The Decision Below Exemplifies Confusion In Lower Courts On When To Apply *Per Se* Scrutiny

The Seventh Circuit is not alone in its confusion over the level of scrutiny to apply to laws that regulate out-of-state transactions. As one state supreme court observed, "the United States Supreme Court [has never] dealt with a case involving a state's attempt to regulate the issuance of securities by a utility engaged in multi-state operations." *State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co.*, 217 S.E.2d 543, 549 (N.C. 1975). Absent this guidance, courts have struggled with the proper approach in reviewing such state actions.

In *Southern Union Co. v. Missouri Public Service Commission*, 289 F.3d 503 (8th Cir. 2002), a multi-state holding company challenged a Missouri law that required public utilities doing business in the state to receive administrative approval before investing in another utility company. In sustaining the law, the Eighth Circuit ruled that the *per se* rule in Commerce Clause analysis did not apply "in the context of public utility regulation" even when the parties and transaction were outside of Missouri's borders. *Id.* at 507. The court reasoned that the interstate transaction could "potentially affect the company's regulated rate of return in Missouri." *Id.* at 508. The Eighth Circuit also relied on its belief that recent decisions of this Court have "limited" the *per se* rule of invalidity to state laws that "patently discriminate against interstate trade." *Id.* (quotations and citation omitted).

The Sixth Circuit adopted a different view in *ANR Pipeline Co. v. Schneidewind*, 801 F.2d 228, 236-38 (6th Cir. 1986), *aff'd on other grounds*, 485 U.S. 293 (1988). In that case, subsidiaries of a holding company challenged a Michigan law that required wholesale utilities to obtain administrative approval before issuing long-term securities.

801 F.2d at 230. Although the state argued the law was designed to protect local ratepayers, the court of appeals struck it down as *per se* invalid. Relying on *Brown-Forman*, the court held that requiring a utility to seek advance approval in Michigan "before issuing securities, the proceeds of which may be used to finance a project in another State, *directly* regulates interstate commerce." *Id.* at 236 (emphasis added). Further, because there was no clear guidance from this Court that the *per se* rule applied in these circumstances, the Sixth Circuit proceeded to analyze the Michigan law under the *Pike* balancing test, and found that the law failed that test also. *Id.* at 236-38.[5]

Other courts, including at least one state supreme court within the Seventh Circuit, have struck down local securities regulation of interstate utilities or common carriers on Commerce Clause grounds. For example, in *United Air Lines, Inc. v. Interstate Commerce Commission*, 207 N.E.2d 433 (Ill. 1965), the Illinois Supreme Court held that the state violated the Commerce Clause when it sought to subject the out-of-state issuance of the securities of a Delaware corporation with its principal place of business in Illinois to the scrutiny of the Illinois Commerce Commission. The Court went as far as holding that even the domestic portion of the distribution could not be regulated in this manner by Illinois because it would sanction the potential imposition of controls by each state of contact on a single, indivisible interstate act and this would be expensive, time consuming and burdensome. *Id.* at 437-38. Similarly, in *Panhandle*

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[5] This Court affirmed the Sixth Circuit's decision in *Schneidewind* on federal preemption, but specifically reserved the Commerce Clause issue. 485 U.S. at 311 ("Because we have concluded that Act 144 is pre-empted by the NGA, we need not decide whether, absent federal occupation of the field, Act 144 violates the Commerce Clause.").

Eastern Pipe Line Co. v. Public Utilities Commission, 383 N.E.2d 1163, 1167 (Ohio 1978), the Supreme Court of Ohio held that a state statute regulating the issuance of securities of a natural gas company imposed an undue burden on interstate commerce because the operations of a public utility depended on its ability to issue securities.[6]

Even more generally, in areas outside of utility regulation, the courts have demonstrated confusion about whether to apply *per se* scrutiny to laws regulating out-of-state transactions. For example, in *Diamond Multimedia Systems, Inc. v. Superior Court*, 968 P.2d 539 (Cal.), *cert. denied*, 527 U.S. 1003 (1999), a divided California Supreme Court upheld a state law imposing securities fraud liability where the securities purchaser, seller and transaction all were outside of California. The dissenting justices, relying on *Edgar*, argued that the law was *per se* invalid because California cannot apply its laws to out-of-state transactions, "'whether or not the commerce has effects within the State.'" *Id.* at 1072 (quoting *Edgar*, 457 U.S. at 642-43). In *Arizona Corp. Commission v. Media Products, Inc.*, 763 P.2d 527 (Ariz. 1988), the Arizona Supreme Court sustained a Commerce Clause challenge to an Arizona securities law because it constituted "a direct burden on interstate commerce," as it regulated non-residents' purchases from an

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[6] *See also Michigan Bell Communications, Inc. v. Michigan Pub. Serv. Comm'n*, 399 N.W.2d 49 (Mich. Ct. App. 1986); *State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co.*, 217 S.E.2d 543, 551 (N.C. 1975); *United Air Lines v. Nebraska State Ry. Comm'n*, 112 N.W.2d 414, 422 (Neb. 1961); *Laird v. Baltimore & O.R. Ry.*, 88 A. 348 (Md. 1913); *Haberman v. Washington Pub. Power Supply Sys.*, 744 P.2d 1032, 1054 (1987) (under *Edgar*, Washington Securities Act does not violate Commerce Clause because the state does "not attempt to apply the [law] to transactions completely unrelated to Washington"), *modified*, 750 P.2d 254 (Wash. 1988).

out-of-state corporation that had its principal place of business in Arizona. *Id.* at 533-34.

In short, the manifest confusion in the courts concerning what standard to apply to laws regulating out-of-state conduct requires clarification by this Court. As one commentator has noted, "what we know about extraterritoriality is much less than what we have still to work out."[7] This case presents an ideal vehicle for consideration of this issue because there is no dispute that Wisconsin law applies to transactions occurring entirely outside of that state. (App. 30a-31a). This Court should restore uniformity and predictability in this critical area of the law.

II. The Seventh Circuit's Decision Is Sufficiently Important To A Broad Spectrum Of Industries To Warrant This Court's Review

The decisions of the Seventh and Eighth Circuits authorizing states to regulate public utility holding companies beyond their borders will have an immediate and serious negative impact on the industries that *amici* represent. By virtue of historic capital needs and recent economic trends, most consumers are now served by utilities owned by multi-state holding companies. Those holding companies need large amounts of additional capital to preserve aging infrastructure and to meet the nation's growing demands for service. In this context, the threat of being torn between various state laws limiting or prohibiting diversification,

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[7] Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865, 1913 (1987) (discussing confusion created by this Court's precedents on application of *per se* rule).

restricting the issuance of securities, or otherwise controlling the financial operations of the parent, acts as a powerful deterrent to further investment. The issue raised in the petition is thus of enormous practical importance.

The decision of the Seventh Circuit arrives in an environment where multi-state holding companies are prevalent in each utility industry. In the electrical industry, for example, most U.S. consumers of investor-owned electric utilities receive service from utilities that are owned by multi-state holding companies. Such a holding company may have utility subsidiaries in as many as 11 states.[8] Its activities, especially mergers and acquisitions, will be reviewed by multiple state commissions.[9] In some cases, the multi-state holding companies are in turn owned by foreign holding companies.[10] The consolidation of the electric industry has accelerated as Congress and the Federal Energy Regulatory Commission have encouraged development of

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[8] *E.g.*, American Electric Power Co., Inc. (11 states); Xcel Energy Inc. (11 states); NiSource Inc. (9 states); Northeast Utilities (6 states); Dominion Resources, Inc. (5 states); Southern Company (5 states); Entergy Corp. (5 states); Energy East Corp. (5 states); Pepco Holdings, Inc. (4 states and the District of Columbia). Many utility holding company systems combine electric and gas operations.

[9] For example, when Northern States Power Co. and New Century Energies, Inc. combined to form Xcel Energy Inc., the merger was reviewed by eight state public utility commissions.

[10] National Grid plc owns the New England Electric System (NEES)/Niagara Mohawk system, which serves over 3.2 million customers in four states. E.ON AG owns LG&E Energy Corporation, which has two utility subsidiaries that operate primarily in two states.

competition within large interstate markets and regional management of the transmission grid.[11]

Since the early twentieth century, the gas industry has been characterized by interstate pipelines, *Pennsylvania v. West Virginia*, 262 U.S. 553, 596-600 (1923), and, in recent years, the water industry has also been marked by dramatic consolidation and increasing globalization. Whereas the provision of water service was once the province of local providers, today many water companies are owned by large multi-state entities.[12] Further, the two largest U.S. investor-owned water companies, which account for a large share of the revenues earned by U.S. investor-owned water utilities, have foreign ownership.[13]

One reason for the prevalence of the holding company structure is that the operation of a utility in today's environment requires huge, ongoing capital investments. Aging and insufficient infrastructure, growing demand and ballooning regulatory and security costs have created a tremendous need for investment in U.S. utilities. For example, in the electrical industry, simply maintaining the U.S. electrical transmission grid at its current level will require an investment of about $56 billion during this

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[11] *See Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607, 609-11 (D.C. Cir. 2001).

[12] *See* Nat'l Ass'n of Water Cos., *2002 Annual Report*, at 3 (observing that the water industry has "certainly fulfilled expectations about consolidation with a vengeance").

[13] RWE Aktiengesellschaft, a German conglomerate, is the ultimate parent of American Water, which owns water utility subsidiaries that operate in 27 states. Suez, a French company, owns United Water, which serves about 11 million customers in 18 states.

decade.[14] The gas industry also needs capital infusions. Demand for natural gas has risen spectacularly in the last 10 years, well beyond 1992 forecasts. The industry will require about $1.5 trillion in funds through 2015.[15]

The water industry also has very high capital needs. Hundreds of billions of dollars will be needed over the next 20 years to maintain the nation's 100-year-old water system and keep it compliant with EPA and other regulatory requirements.[16] EPA itself has identified a projected $534 billion water and wastewater funding gap between spending and needs over that 20-year period.[17]

In this environment of multi-state holding companies and dire needs for capital, the Seventh Circuit's decision is, quite simply, a disaster. It opens the door to broad state regulation of the holding company outside the state's borders. It permits limits to diversification, restricts stock issuance, and subjects prospective investors to a cross-fire between extraterritorial state restrictions.

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[14] Eric Hirst & Brendan Kirby, *Transmission Planning and the Need for New Capacity*, *in* U.S. Dep't of Energy, *National Transmission Grid Study* D-1 (May 2002).

[15] *See* Nat'l Petroleum Council, *Meeting the Challenges of the Nation's Growing Natural Gas Demand*, at 2, 16 (1999).

[16] *See generally* U.S. Gen. Accounting Office, *Water Infrastructure: Information on Financing, Capital Planning and Privatization* (2002); *see also* Water Infrastructure Network, *Clean & Safe Water for the 21st Century*, at ES-2 (2000) (projecting investment needs of up to $1 trillion over 20 years).

[17] Office of Water, U.S. Envtl. Prot. Agency, *The Clean Water and Drinking Water Infrastructure Gap Analysis*, at 25-26, 38, 41 (2002).

For example, prior approval of the issuance of securities interferes with the system-wide financial planning essential to the efficient and reliable provision of services. As one court observed, "[f]or this court to place a judicial stamp of approval on such a potentially chaotic possibility would be to ignore economic reality." *Panhandle*, 383 N.E.2d at 1169. Thus, "if [one state] may impose such regulations, so may other States and interstate commerce ... would be thoroughly stifled." *Edgar*, 457 U.S. at 642. Indeed, the "cases demonstrate" that the "mere possibility" of conflicting or dual regulation makes the state law "a direct regulation and an impermissible burden on interstate commerce." *Southern Bell*, 217 S.E.2d at 551, citing *United Airlines*, 207 N.E.2d at 438.

State limits on holding company diversification also pose obstacles to investment. The asset cap is non-discriminating and does not distinguish between diversified assets that have enhanced the financial stability of a holding company system and those that have not. In fact, many successful overseas utility holding company systems are highly diversified, by U.S. standards. For such cash-rich companies, asset caps present a harsh barrier that either precludes investment in U.S. utilities or requires them to divest diversified assets that have increased their earnings and allowed them to lower their risk profiles.

Indeed, in view of the limits on diversification and the obstacles to rational capital investment created by the Seventh Circuit's decision, even companies that do not hold public utilities are concerned with this case. The National Association of Manufacturers has joined this brief because it recognizes the need for the free flow of capital to utility projects. Manufacturers require well-built, well-maintained utility systems to provide affordable, reliable service. A crazy-quilt of extraterritorial state regulation will raise the costs and possibly lower the quality of such service.

Holding companies already face the prospect of having to obtain multiple state approvals for their actions. For example, when a German company acquired a U.S. holding company with water utilities, 14 state public utility commissions reviewed the acquisition and many imposed conditions. One local utility (Arizona-American) argued that the Arizona Commission violated the Commerce Clause by regulating a non-public stock transfer between nonresident corporations and imposing conditions for the stated purpose of extracting benefits for Arizona ratepayers.[18] Arizona regulators invoked the Seventh Circuit decision in defending their rights to approve and condition the merger.[19]

As this example illustrates, the Seventh Circuit's dramatic departure from this Court's Commerce Clause jurisprudence is likely to inspire other states to assert jurisdiction beyond their borders. It comes on the heels of an Eighth Circuit decision to similar effect. A structural departure of this magnitude from the constitutional scheme must be addressed promptly because of its potential to engender regulatory havoc among the states. *See Healy v. Beer Institute*, 491 U.S. at 333 n.9. It cannot to be allowed to create paralysis in the financial markets.

The Seventh Circuit decision has serious, adverse implications in the current environment. But the situation can only get worse. The Securities and Exchange Commission, charged with administering the federal Public

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[18] Brief of Arizona-American Water Co., at 25-34, *filed in Arizona-American Water Co. v. Arizona Corp. Comm'n*, No. 1 CA-CC 03-0001, Arizona Court of Appeals on May 12, 2003.

[19] Brief of Arizona Corp. Comm'n, at 32, *filed in Arizona-American Water Co. v. Arizona Corp. Comm'n*, No. 1 CA-CC 03-0001, Arizona Court of Appeals on June 26, 2003.

Utility Holding Company Act (PUHCA), has called for its abolition,[20] and this year both houses of Congress passed bills containing PUHCA repeal provisions.[21] If the federal PUHCA is repealed, additional states will undoubtedly seek to impose their own forms of regulation on utility holding companies, including regulation of their investments and capital issuance in other states. The nation's public utilities will face further obstacles in their efforts to raise adequate capital to meet the nation's needs.

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[20] *See, e.g.*, Div. of Inv. Mgmt., U.S. Sec. and Exch. Comm'n, *The Regulation of Public-Utility Holding Companies* (June 1995).

[21] The PUHCA repeal measures are embedded in comprehensive energy bills that have not been passed for reasons unrelated to PUHCA repeal.

CONCLUSION

The Seventh Circuit's decision is inconsistent with decisions of this Court and reflects continuing confusion as to the proper standard to apply to extraterritorial state regulation of utility holding companies. This is a question of great practical importance in today's economy. The petition for a writ of certiorari should be granted.

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